Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-860

WILLIAM MANSKER CLUBB,
Petitioner,

versus

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi is reported at 350 S.2d 693 and is printed herein as Appendix A. The Order denying the Petition For Rehearing is printed as Appendix B.

JURISDICTION

The Judgment of the Supreme Court of Mississippi was entered on September 28, 1977. The Court denied a Petition for Rehearing on October 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section

1257 (c) since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Did a violation of the petitioner's Fifth, Sixth and Fourteenth Amendments rights occur when the prosecution held a post-indictment photographic display in place of a line-up in order to subvert the requirement of presence of counsel as declared necessary by decisions of this Court?

2. Was the petitioner denied due process of law as required by the Fifth and Fourteenth Amendments by the trial court's refusal to instruct the jury that the prosecution must prove beyond a reasonable doubt that the petitioner was present and participated in the crime charged in the indictment?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT XIV, SECTION 1

". . . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

On the night of July 25, 1974, a gambling party was in progress in a boat house located on the water in Ocean Springs, Mississippi. Approximately twenty persons were in attendance at the party, when, at about 9:30 P.M., someone knocked at the door of the boat house. Someone answered the door and three armed men entered the room. The three men wore stocking masks over their heads and one of the men was later described as being 6'3" or 6'4" and weighing between 230 and 250 pounds and wearing a medallion around his neck. The three men robbed the occupants of approximately $16,000.00 in valuables and then departed.

Later, the local law enforcement officials notified the other area agencies in the course of their

investigations and received from the Sheriff's Department of Jefferson Parish, Louisiana a number of photographs, one which was of the petitioner, wearing a medallion. The photograph was shown to four persons having knowledge of the robbery and two of the persons identified the petitioner as being one of the robbers, while the two other persons could not identify the petitioner as one of the robbers.

Based on this identification, the petitioner was indicted by the Jackson County, Mississippi Grand Jury for the crime of armed robbery. In trial preparation, the assistant district attorney called his witnesses in and showed them a photographic line-up at which time the petitioner was identified. This photographic line-up was made after indictment, and the petitioner's counsel was not informed of this line-up, much less allowed to attend and examine the witnesses. The petitioner is a large man and the victims testified a large man wearing a medallion was one of the robbers. Of the photographs shown the witnesses at this line-up, the petitioner was the only large man displayed and the only one wearing a medallion.

At the trial held after this photographic line-up, the State of Mississippi produced five witnesses who had been on the scene of the robbery and each of them made an in-court identification of the petitioner as being one of the robbers. The petitioner's attorneys called five other persons who were victims of the robbery and each testified that they could not identify the petitioner as one of the robbers.

Before and during the trial, counsel for the petitioner repeatedly moved the trial court to sup-

press this tainted identification evidence and was overruled on every attempt. At the conclusion of the testimony, the trial court considered requested jury instructions of the state and petitioner and refused the petitioner's instruction number D-11 which read as follows:

> "The Court instructs the jury that if there is a reasonable doubt in your mind as to the identification of the defendant as having been present and participated in the robbery in question on or about July 25, 1974, at the boat house in Gulf Hills, then such doubt must be resolved in favor of the defendant and it is your sworn duty to return a verdict of not guilty."

This instruction was refused by the trial court and the case went to the jury on identification testimony only, the State of Mississippi failing to produce any other evidence, documentary, tangible or otherwise to link the petitioner with this crime. The petitioner was convicted and received a sentence of fifty years in the state penitentiary.

ARGUMENT

I.

The Petitioner's Fifth, Sixth And Fourteenth Amendment Rights Were Violated By The Prosecution's Post-Indictment Photographic Line-Up Made In Effort To Subvert The Requirement Of Counsel Declared Necessary At A Post-Indictment Line-Up.

Relying on *United States v. Ash*, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973), the State of Mississippi conducted a post-indictment photographic line-up in an effort to avoid the presence of the petitioner's counsel as would be required by *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). As set forth above, before trial the prosecution conducted a photographic line-up and the petitioner was identified by some of the witnesses to the robbery. All three robbers wore stocking masks and one was described by those present as being a large man 6'3" or 6'4", weighing between 230 and 250 pounds. This large man was further described as wearing a medallion. Of the photographs displayed to the witnesses at this line-up, the petitioner was the only large man and the only man wearing a medallion. Counsel was not informed of or permitted to attend this photographic line-up. The decisions of this court require the presence of counsel at the "normal" post-indictment line-up where various persons are brought before witnesses in an effort to identify a suspect to a crime. By having competent counsel present, the abuses as were present in this case, would have been avoided. If in this case, a "normal" line-up were held, the petitioner's counsel could have made sure persons with similar builds and features would be present standing with the petitioner and certainly a medallion would not be worn by the petitioner to the exclusion of the other men in the line-up. In *Wade*, this Court held a post-indictment line-up to be a "critical stage" of prosecution necessitating Sixth Amendment requirement of counsel. This decision stopped police tactics which denied a defendant fundamental constitutional rights. Should the prosecution be allowed to circumvent the *Wade* decision by conducting post-indictment photo-

graphic line-ups which, as in this case, include the abuses of a pre-*Wade* post-indictment line-up? A photographic line-up as conducted in this case right before trial is even more a "critical stage" of prosecution than a "normal" post-indictment line-up. Counsel should be present to stop the prosecution's efforts to initiate by unfair means a concept of the defendant in the witnesses' minds before trial. To allow the prosecution to conduct a photographic line-up to subvert the requirement of counsel would by the nature of our adversary system put undue pressure on witnesses to the detriment of a defendant's constitutional rights. In the *Ash* case, this Court speaks of the Sixth Amendment right to counsel as a method or motivation to minimize the imbalance in the adversary system that as resulted with the creation of a professional prosecuting official such as in this case, the District Attorney's office. There can be no question that witnesses brought into the office of the prosecuting attorneys right before trial and shown photographs of a defendant are going to be influenced by their surroundings and by actions and suggestions of the prosecutors. Once the state has focused its attention on one defendant, all efforts are made in order to sustain a conviction. Without the defendant's counsel being present, there is no safe guard whatsoever to stop the subtle intentions of the prosecutor to place in the mind of the witnesses that the photographs they are viewing represent the person who committed the crime. It is obvious in this case from the nature of the photographs shown the witnesses that the prosecutors went further than mere suggestions. The nature of the photographs shown the witnesses confirm this fact. It should also be recognized that the

photographic display in this case was improper under the "totality of the circumstances" test as set forth in *Stovall v. Renno*, 388 U.S. at 302, 87 S. Ct. at 1972, 18 L. Ed. at 1206. With the exception of the photograph of the petitioner, no other photographs of large men wearing medallions were shown the witnesses before trial. They had virtually no choice in this photographic line-up. Trial preparation focuses on a particular person and even more safeguards should be enforced to insure proper identification and thus effect the correct administration of justice in regard to the defendant and the prosecution.

Again, the *Wade* court asserted the Sixth Amendment guarantee to include "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial". 388 U.S. at 226, 87 S. Ct. at 1932. The Court further stated that "any pretrial confrontation of the accused must be scrutinized to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself". 388 U.S. at 227, 87 S. Ct. at 1932.

II.

The Petitioner Was Denied Due Process Of Law As Required By The Fifth And Fourteenth Amendments By The Trial Court's Refusal To Require The Prosecution Prove Beyond A Reasonable Doubt The Necessary Element That The Petitioner Was Present And Participated In The Crime.

In the trial of this case, the only evidence offered by the prosecution against this petitioner was identification testimony of five witnesses. The petitioner called five victims of the robbery to the stand and they declared they could not identify the petitioner as one of the robbers. The trial court refused the following jury instruction requested by the petitioner:

> "The court instructs the jury that if there is a reasonable doubt in your mind as to the identification of the defendant as having been present and participated in the robbery in question on or about July 25, 1974, at the boat house in Gulf Hills, then such doubt must be resolved in favor of the defendant and it is your sworn duty to return a verdict of not guilty".

Identification testimony was the only evidence offered by the prosecution in this case yet the trial court refused this instruction.

The law imposes and places upon the prosecution in a case of this nature the burden of proving the crime set forth in the indictment in all its material parts and elements beyond a reasonable doubt and the jury, after proper instructions by the trial court, must find from the evidence presented that all the elements of the crime charged have been established beyond a reasonable doubt. *Lilienthal v. United States*, 97 U.S. 237, 24 L. Ed. 901 (1878). *Holt v. United States*, 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 (1910). The prosecution's entire case was based on the identification testimony of five witnesses which was countered by five victims of the robbery who testified that they did not recognize the petitioner as one of the robbers. Due process of

law requires that this petitioner be allowed to submit the above instruction to the jury as a means of making the jury aware of prosecution's burden of proof in regard to the only evidence the State of Mississippi offered against the petitioner.

Further, by the trial court's refusal to grant this jury instruction, the petitioner was denied a fundamental right to have the jury instructed as to his theory of the case as supported by the competent evidence. "The defendant in a criminal prosecution is entitled to an instruction defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, and if it is not unreasonable or stamped with improbability". 75 Am 2d Trial § 727. The witnesses called by the petitioner were not impeached or otherwise shown to have any bias for or against the petitioner. They simply testified they were present during the robbery and did not recognize the petitioner as one of the three men who entered the boat house on July 25, 1974. The petitioner presented competent evidence and should have been allowed to be accorded the right to have the jury instructed on his theory of the case.

CONCLUSION

Wherefore, it is respectfully submitted that this Court should grant this Petition and issue a Writ of Certiorari to the Supreme Court of Mississippi.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi to Attorney General A. F. Summer, Post Office Box 220, Jackson, Mississippi 39205.

This the ____ day of December, 1977.

Of Counsel

APPENDIX "A"

William Mansker CLUBB

versus

STATE of Mississippi.

No. 49836.

Supreme Court of Mississippi.

Sept. 28, 1977.

Rehearing Denied Oct. 26, 1977.

Johnston, Wright & Steinberger, Fielding L. Wright, Jr., Pascagoula, for appellant.

A. F. Summer, Atty. Gen. by Billy L. Gore, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before INZER, ROBERTSON and BOWLING, JJ.

INZER, Presiding Justice, for the Court:

William Mansker Clubb was indicted, tried and convicted in the Circuit Court of Jackson County for the crime of armed robbery. He was sentenced to serve fifty years in the State Penitentiary, from which he appeals.

On the night of July 25, 1974, a gambling party was in progress in a boat house owned by Robert Vance and located over the water on Corwell Drive in Gulf Hills. Approximately twenty men and women were in attendance. About 9:30 p. m. a knock was heard at the door. Thinking it was someone else seeking to join in the gambling game and being unaware of what was about to happen, one of the occupants opened the door. Three men armed with hand guns burst into the room. The intruders wore stocking masks over their heads. This intrusion brought the games of chance to an unexpected conclusion. The three men required all persons present to place their hands on the dice table and told them not to look up. One by one the men were taken into the hallway where they were forced to give up all their valuables. They were then ordered to strip to their underwear and were taken into a backroom where their hands and feet were bound. After the men were stripped of their valuables and clothing, the women were forced to hand over their valuables and they, too, were bound. Although searched, the women were not required to shed their clothing.

The robbers were in no hurry to complete their job; hence, the proceedings took well over an hour. While they were busily engaged with those already present, other people arrived to join the party. To their utter amazement, they too were confronted by the armed men and forced to join in the hands on the table game. They, too, were robbed and firmly bound. After the robbers had relieved those present of all their valuables (it is estimated that approximately $16,000 was taken) the robbers departed.

After their departure the Jackson County Sheriff's department was notified of the robbery. The crime was

investigated by Jerry Quave and after obtaining a description of the robbers from Claudine Hans, who was present during the robbery, he sent out an inquiry to the law enforcement agencies in the area for aid in identifying the robbers. The sheriff's department in Jefferson Parish, Louisiana, sent Quave ten photographs of people, who in their opinion, were capable of committing the crime. Quave showed the photographs to four persons who had knowledge of the robbery. Mrs. Hans identified the photograph of appellant as being one of the robbers. J. B. Richmond, Sr. identified the appellant as being one of the three men he had seen near the boat house on the day before the robbery. Two other persons robbed were shown the photographs, but they were unable to identify the appellant as one of the robbers.

Appellant, along with two other persons, was indicted in September 1973 and charged with armed robbery. A motion was filed to suppress the evidence relative to the identification and it was overruled. Due to a technical defect in the indictment, the original indictment was quashed, and appellant was reindicted in September 1975 by the April 1975 grand jury. Another motion was filed to suppress the identification evidence, and it was likewise overruled. In preparation of the trial of the case, the assistant district attorney, in interviewing people who were present when the robbery occurred, would lay the photographs furnished Quave out on a table and ask the person being interviewed, "Do you recognize any of these people?" Four people interviewed separately identified the picture of appellant as being one of the men who robbed them. The assistant district attorney knew that

appellant was represented by counsel, but he never notified the attorney that he was conducting the photographic lineups.

At the trial of the case, the state produced five witnesses who were robbed and each of them made an in-court identification of appellant as being one of the robbers. The defendant called five other persons who were victims of the robbery, and each of them testified that they could not identify appellant as being one of the robbers. The defendant also called Assistant District Attorney Colingo and questioned him relative to the method used in interviewing the witnesses.

In rebuttal the state called as a witness J. B. Richmond, Sr. who testified that on the day before the robbery he saw appellant and two other men having a discussion of some nature near the boat house where the robbery occurred. After both sides rested, appellant made a motion for a directed verdict, alleging several grounds therefor, including that the photographic lineup conducted by the assistant district attorney in the absence of counsel for the defendant so tainted the identification to the extent that the evidence should be excluded. This motion was overruled and the jury found the defendant guilty as charged.

On appeal it is contended that the trial court was in error in overruling defendant's motion to suppress the photographic identification for the reason that such identification was totally tainted in the light of the surrounding circumstances. In this connection, appellant raises the question of whether he had a right to have counsel present on post-indictment pretrial photographic identification.

Both appellant and the state agree that the issue is whether the photographic lineup or array offended against the Constitution. Both also agree that the proper test to be applied is the question of whether the conduct of the confrontation violates due process in light of the totality of circumstances surrounding the confrontation.

We see nothing unduly suggestive about the first use of the ten photographs received from Louisiana authorities. All that the investigating officers had was a description of the three men who committed the robbery. After receiving these photographs, the officers naturally called in some persons who were present to see if they could identify any of the people as being the ones who committed the robbery. As a result of the use of the photographs, appellant and two other men were identified and indicted. There is no indication that the officer influenced the witnesses to identify any person in the photographs included in this group.

The only serious question relative to the identification concerns the use of the photographs by the assistant district attorney in his preparation for trial. At that time appellant was indicted and had counsel representing him. The testimony of the assistant district attorney establishes that he had been appointed after the appellant was indicted due to the district attorney being indisposed. In reviewing the file he found the photographs, and interviewed the witnesses, not in a group, but individually. He spread the photographs to ascertain whether the witness could then identify anyone in the group as being one of the robbers.

The first question is whether this photographic lineup violated appellant's Sixth Amendment right to

have counsel present at the confrontation. The lineup in the present case is somewhat similar to that in *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973), where the prosecutor after indictment and in preparation for trial used a photographic display to determine whether the witness he planned to call would be able to make an in-court identification. The Supreme Court of the United States held that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt identification of the offender. Appellant recognizes the rule announced by the Supreme Court, but contends that we should do as some other states have done and adopt a more stringent rule. While we have not considered a photographic lineup in the light of the *Ash* decision, we did in *Stevenson v. State*, 244 So.2d 30 (Miss.1971), say, among other things:

> Appellant contends that the photograph shown to Mr. McCaffrey from which he identified appellant as one of the robbers was tantamount to a lineup without the appellant or his counsel being present and that this brings this case within the rule announced in *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). However, the rule announced in *Wade* and other lineup cases does not apply to out of court photograph identification whether the accused is in custody or not. *United States v. Ballard*, 5 Cir., 423 F.2d 127 (1970). Furthermore, in this case there was ample evidence to show that Mr. McCaffrey's in-court identification was based upon independent facts. (244 So.2d at 33).

The holding in *Ash* is in line with what we said in this case, and we think it is the proper rule.

Viewing the photographic identification in the instant case in the light and totality of the circumstances, we do not find that it was so impermissible as to give rise to a substantial likelihood of irreparable misidentification. *Evans v. State*, 273 So.2d 495 (Miss.1973). Even if it could be said that the photographic identification was impermissibly suggestive, the evidence is sufficient to show that the witnesses made an in-court identification of the appellant based upon an adequate opportunity to observe him during the course of the robbery. They were able to make the identification without the dependence upon or assistance from the photographs.

In summary, we are of the opinion that the trial court was correct in overruling appellant's motion to suppress the identification evidence. There is very little, if any, evidence that the photographic identification was prejudicial or impermissibly suggestive. The evidence is sufficient to support the finding of an independent source.

Appellant next contends that the trial court was in error in requiring defense counsel to state to the jury that he made an erroneous statement of law in his closing argument, when, in fact, the statement of counsel was a correct statement. The record reflects that in his closing argument, defense counsel stated:

> And they have arrested Mr. Clubb, and they charged that he took a bunch of stuff, but I

> don't see one thing on that table over there. Not one exhibit. They have got to prove it, remember. That he took it, carried it away, and converted it to his own use.

When defense counsel concluded this argument the trial judge called the attorneys to the bench and subsequent to a conference, Mr. Wright stated to the jury:

> The discussion was that the state doesn't have to prove that he converted it to his own use. But everything else I told you about what they have got to prove remains exactly the same. They got to prove he took it.

Defense counsel then objected and took exception to the ruling of the court that he was wrong in his statement of the law to the jury. The court replied, "The jury and attorneys should go by the instructions." Appellant contends that under our holding in *Thomas v. State*, 278 So.2d 469 (Miss. 1973), his statement of the law to the jury was correct. The issue in *Thomas* was whether Thomas intended to permanently deprive the police officers of their property, and we held that it was error to refuse to grant the defendant an instruction covering that issue. No such issue was raised in this case. Appellant did not request the court to instruct the jury as to this feature of the case. We are of the opinion that the evidence in this case was sufficient to prove the asportation and is in keeping with what we held in *Bell v. State*, 259 So.2d 118 (Miss.1972).

While a trial judge has wide discretion in presiding over a trial and has the authority to require counsel to

correct an erroneous statement made to the jury, the judge should be careful in doing so, to avoid prejudicing the defendant. The trial court should assume that the jurors make allowances for overstatements and claims of attorneys in arguing their case for their clients. However, after review of the record in this case, we do not feel that the action of the trial judge was prejudicial or that it deprived the defendant of a fair trial.

Appellant assigns as error the refusal of the court to grant his instruction D-11 which reads as follows:

> The court instructs the jury that if there is a reasonable doubt in your mind as to the identification of the Defendant as having been present and participated in the robbery in question on or about July 25, 1974, at the Boat House in Gulf Hills, then such doubt must be resolved in favor of the Defendant and it is your sworn duty to return a verdict of Not Guilty.

First, it should be observed that the instruction is abstract in form. A similar instruction was reviewed in *Ragan v. State*, 318 So.2d 879 (Miss.1975), and we held that the instruction was clearly erroneous for the reason that reasonable doubt of the guilt or innocence of the accused in a criminal case is not based on just a part of the evidence but rather on the entire case, including the circumstances surrounding the crime. Appellant would have been entitled to an instruction covering this feature, but the instruction offered was correctly refused. Appellant also contends that In-

struction S-2 granted at the request of the state is erroneous. We find no merit in this contention.

After careful consideration of the record in this case, we find no reversible error and for that reason, we are of the opinion that the case should be affirmed.

AFFIRMED.

PATTERSON, C. J., SMITH, P. J., and ROBERTSON, SUGG, WALKER, BROOM, LEE and BOWLING, JJ., concur.

APPENDIX "B"

SUPREME COURT OF MISSISSIPPI

WEDNESDAY, OCTOBER 26, 1977, COURT SITTING

WILLIAM MANSKER CLUBB

versus #49,836

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing as filed herein and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.